Questions Presented.

1. Do the Fifth and Fourteenth Amendments require a condemnor to pay damages for loss of, or damage to, business goodwill, when full payment has been made for the taking and damaging of the real property on which the business was located?

2. When the condemnation requires the total demolition of structures upon land, and consequent temporary occupation of the land during demolition, and also a permanent taking of a portion of the land, is the owner-occupant entitled to be compensated for the moving and storage expenses he has incurred in moving out, and after building a new building, moving back in?

Statutes Involved.

In addition to those statutes cited and relied on by Petitioners, the following statute is involved herein:

> "The 'good will' of a business is the expectation of continued public patronage." Calif. Bus'n & Prof. Code §14100.

ARGUMENT.

I.

Loss of Business or Damage to Business Goodwill Is Not Compensable Under the Fifth and Fourteenth Amendment.

This court has consistently held that loss of business, profit, or goodwill which occurs as an incident of a condemnation of land and buildings is not compensable. See: *Joslin Mfg. Co. v. City of Providence,* 262 U.S. 668, 675 (1922); *Mitchell v. United States,* 267 U.S. 341, 345 (1925); *United States v. General Motors Corp.* 323 U.S. 373, 379 (1945); *United States v. Petty Motor Co.,* 327 U.S. 372, 377-378 (1946); *Kimball Laundry Company v. United States,* 338 U.S. 1, 11-12 (1949); and in the lower Federal Courts: *R. J. Widen v. United States,* 357 F. 2d 988, 993-994 (Ct. of Claims, 1966); *Stipe v. United States,* 337 F. 2d 818, 821 (10th C., 1964); *A. G. Davis Ice Company v. United States,* 362 F. 2d 934, 936 (1st C., 1966); *United States v. Certain Lands,* 183 F. 2d 320, 321 (3rd C., 1950) and *United States v. 26,699 Acres of Land,* 174 F. 2d 367, 368 (5th C., 1949). As stated in *General Motors* at page 380:

> "Even where state constitutions command that compensation be made for property 'taken or damaged' for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership *does not include losses to his business or other consequential damage.*" (emphasis added).

Petitioners have recognized the existence of these cases and the general rule (Petition, p. 14), but argue that the rule should be changed because "an ever-growing segment of the population" (Petition, p. 9) is facing acquisition of their property for public use; and that the rule should be changed in California because California statutes say that business goodwill "is property and is transferable" (Calif. Bus'n & Prof. Code §14102) and include "good-will of a business" as a subject of ownership. (Calif. Civil Code §655.)

a. Business Goodwill Is Seldom, if Ever, Destroyed by a Taking of the Real Property Which the Business Occupies.

With respect to the first argument, we fail to see how an increase in the number of condemnations is relevant to the problem of whether business losses are to be compensated. The goodwill of a business, if it had any, is not destroyed by condemnation of the land it occupies. The goodwill may be retained if the business is relocated.

This case is a perfect example of why business goodwill should not be considered in condemnation cases. Mr. and Mrs. Siegel owned both the real property and the businesses. Upon the condemnation of their land and buildings—for which they were fully compensated—they could have relocated their businesses. After Hoover Street was built they could sell the land. They were not required by the city—or by anyone—to close their businesses during the construction period. This was their own choice. Yet they seek to have the city pay for the consequent damage or destruction of the goodwill of their two businesses.

If the exercise of the power of eminent domain adversely affects the small businessman, it is not because his property is taken. It is because the public improvement causes his customers to relocate to another neighborhood, or because it becomes inconvenient for his former customers to reach his place of business. In other words, these small businessmen may often survive only if the *status quo* is maintained. Certainly a person does not have a property right in the *status quo*. (*Stipe v. United States,* 337 F. 2d 818 (10th C., 1964) where plaintiff sought damages because the truckers who were his customers utilized a new highway rather than the old highway.) Neither does a person have a property right in his customers. (*Hooten v. United States,* 405 F.2d 1167 (5th C., 1969) in which plaintiff lost his contracts to maintain tenements located in the El Paso "Chamizal" area which was ceded to Mexico.)

Indeed, in *Kimball Laundry Co. v. United States,* 338 U.S. 1, 12 (1949) this court said of "good will" and "going-concern value:"

> "In the usual case most of it can be transferred; in the remainder the amount of loss is so speculative that proof of it may justifiably be excluded."

Business losses are not compensable because they are not primarily caused by the condemnation of the land on which the business is located. They merely occur at the same time.

b. Business Goodwill Is Merely an Expectancy. Though Protected Against Unlawful Interference, and Though Transferable, It Is Not Property in the Constitutional Sense.

Petitioners argue that because business goodwill is listed as an item subject to ownership it therefore is compensable when taken or damaged for public use. This does not follow. "Property" and "ownership" as used in the California statutes describes relationships between persons. It does not refer to things or to "rights" in the abstract.

Under California law there may be a property right in an expectancy, a thing, or a privilege as between private persons, but not as between the owner and the government. (See *People v. Walker,* 33 Cal. App. 2d 18, 20 (1939) relating to burglary of slot machines; and *Belle' Isle v. Hempy,* 206 Cal. App. 2d 14, 16 (1962) relating to a liquor license.) All that California Civil Code Sections 654 and 655 and California Bus'n & Prof. §14102 mean is that business goodwill will be protected by the courts (*Hunt v. Phinney,* 177 Cal. App. 2d 212, 216 (1960)) and is transferable (*Handy-spot Co. v. Buegeleisen,* 128 Cal. App. 2d 191, 195 (1954).) The statutes do not convert goodwill into a tangible thing—or vested right—which is protected by the eminent domain provisions of the constitution.

Indeed, business goodwill is but an expectancy, and is so defined by Calif. Bus'n & Prof. Code §14100:

> "The 'good will' of a business is the expectation of continued public patronage."

One is not entitled to compensation for the frustration of an expectancy, even though the expectancy has value and is marketable. Both this court, in *United States v. Rands,* 389 U.S. 121, 124 (1967), and the California supreme court, in *Colberg Inc. v. State of California,* 67 Cal. 2d 408, 416 (1967), have denied compensation based upon the value of the right to navigate a river. The courts, in each case, recognized that a *right* existed, but one "not assertable" against the sovereign. Similarly, the "expectancy of continued patronage" is salable—but it is not such an interest as to be compensable when land and buildings are acquired for public use.

II.

The Taking Involved in the Within Petition Is Not Comparable to That Involved in United States v. General Motors, 323 U.S. 373.

Petitioners, in their claim for moving expenses argue that *General Motors* requires that such expenses be paid whenever there is a temporary taking, and, that the "doctrine" of *General Motors* is applicable to the states.

With respect to the latter argument, they say, at page 18 of the petition: "It does not seem open to serious argument that this court's construction . . . is binding on the states. . . ." No citation of authority nor any reasoning supports this assertion. To the contrary, to our knowledge, the alleged "doctrine" of *General Motors* has not been followed at all. In *United States*

v. Westinghouse E. & Mfg. Co., 339 U.S. 261, 263-264 (1950) it is explained that *General Motors* applied only when the Government "*desires merely temporary occupancy of premises under lease.*" And, even then, *General Motors* said evidence of moving costs, storage fees, and etc. was admissible only to determine the market value of the temporary occupancy, "not as independent items of damage" (323 U.S. at 383) which the petitioners are claiming.

The factual distinctions between the facts of the within petition and of *General Motors* are great. Here, the condemnees were left with a fee interest in usable vacant land, located on a newly improved street. It was readily salable. General Motors was left, after the taking, with four, or less, years of an original 20 year lease. The short term occupancy which remained was unlikely to be salable.

Under the facts of *General Motors,* it could be said the condemnee was forced to "move out, store, and move in," or, in the alternative, pay rent for the remainder of the lease after the Government surrendered possession. Here, only one move was necessary if petitioners relocated their businesses. They chose not to do so.

Conclusion.

Both the damage to business goodwill and the extra moving expenses occurred because petitioners, Mr. and Mrs. Siegel, were unwilling to move their business to new locations. Had they done so, they could have "trans-

ferred" the goodwill and eliminated more than one-half of the moving costs.

For this reason, and also because the general rule relative to business losses and moving expenses is correct, their petition for Writ of Certiorari should be denied.

Respectfully submitted,

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